IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

Case No. : C.R.No.4438 of 2004

Date of Decision : December 01, 2006.

M/s Aarti Steels Limited ..... Petitioner

Vs.

American President Lines Limited and another ..... Respondents

Coram : Hon'ble Mr.Justice P.S.Patwalia

* * *

Present : Mr.M.L.Sarin, Senior Advocate
with Mr.Hemant Sarin, Advocate
and Mr.D.B.Singh, Advocate
for the petitioner.

Mr.Sanjeev Sharma, Advocate
for the respondents.

* * *

P.S.Patwalia, J. (Oral) :

C.M.No.24069-C II of 2006 :

Application is allowed.

The documents Annexure R-1 and R-2 are taken on record.

C.M.No.24070-C II of 2006 :

Application is allowed.

Exemption as prayed for by the respondents is granted.

Main Case :

Learned counsel for the petitioner has filed an affidavit of Shri Sohan Lal Mittal, son of Shri Salig Ram, Director of the petitioner-firm. A copy of the same had already been supplied to the counsel for the respondents. The same is taken on record.

The present revision petition has been filed against order dated

7.5.2004 vide which an application under Order 1 Rule 10 read with Section 151 CPC and Section 40 of the Specific Relief Act, 1963 seeking amendment of the plaint for including the relief of damages in substitution for the relief of injunction already claimed in the suit, was declined by the trial court.

A perusal of the facts of the case as emerging from the pleadings on the record and the contentions of the learned counsel for the parties are that the petitioner, plaintiff in the trial court had filed a suit for permanent injunction against the defendants for withholding goods purchased from a company in Kuwait at Bombay and for directing the respondents to dispatch and deliver them from the Bombay Port to ICD Terminal at Ludhiana, as per the agreement allegedly entered into between the petitioner and the respondents. The goods had arrived in Bombay by the time the suit was filed. It is the admitted position that in the suit, an application Under Order 39 Rules 1 and 2 was filed which was decided by the trial court and an interim order was granted in favour of the plaintiff. This order was confirmed in appeal by the first appellate court. But in revision this Court set aside both the aforesaid orders and vacated the interim injunction. The petitioner then preferred a Special Leave Petition (SLP) before the Hon'ble Supreme Court which was also dismissed on 24.11.1997. I need not go into the subsequent events in great detail. However it deserves to be mentioned that after the dismissal of the interim injunction in November 1997 the petitioner filed an application dated 18.2.1998 for revival of the suit. In the meanwhile since the goods which were lying in the ports at Bombay were incurring heavy demurrage/detention charges and costs the respondents herein, defendants in the suit, approached the High Court at Bombay with a plea that they should be granted permission to sell the goods so as to defray the various charges which had been incurred by the goods having remained in the Bombay Port. In that litigation a Receiver was appointed by Bombay High

Court on 9.10.1997 to facilitate the sale of the goods. The goods were ultimately sold by the Receiver in the year 2002.

It is apparent that once the goods had been ordered to be sold by the Bombay High Court and were actually sold the relief of permanent injunction sought by the petitioner, was incapable of being granted to them. It is at this stage that the present application was filed on 9.8.2002 for adding the relief of damages in substitution of the relief of injunction already claimed in the suit. The petitioner-plaintiff also claimed that it should be permitted to implead the Bombay Port Trust as also M/s Mohammad & Nassari Co., Kuwait as defendants in the suit. The application filed by the petitioners was opposed by the respondent-defendants on numerous grounds. It is this application which was considered by the trial court and has been dismissed. The operative portion of the order of the trial court is as hereunder :-

> *".....In my view earlier plaintiff moved application for revival of said suit and then moved present application by way of impleading parties and by making amendment in plaint and it will change whole nature of suit and will have a different cause of action. No doubt as per Section 40 of Specific Relief Act the plaintiff may claim charges either in addition to or in substitution for any injunction. But in present case reliance is placed upon authority "Ram Parkash vs. FCI 2004 (1) Civil page 93 P&H" in which it is held that "Amendment of plaint-permissibility-suit for declaration and injunction suit became instinct on setting aside injunction by Appellate Court- said order not challenged-prayer to convert same into suit for damages-Held, plaintiff cannot be*

permitted to change nature and character of suit instead of filing suit for damages separately to which he is entitled.....”

A reading of the observations extracted herein above would show that the trial court was of the opinion that if the application was allowed, it would change the entire nature of the suit. Rather the trial court was of the opinion that the plaintiff would have to file a separate suit for damages. On the aforesaid findings the application was rejected. It is against the said order of the trial court that the present revision petition has been filed.

Mr.Sarin, learned senior counsel appearing for the petitioner has drawn my attention to Section 40 of the Specific Relief Act, 1963. He has particularly referred to sub-section (2) and (3). Section 40 in its entity reads as hereunder :-

“40. Damages in lieu of, or in addition to, injunction – *(1) The plaintiff in a suit for perpetual injunction under section 38, or mandatory injunction under section 39, may claim damages either in addition to, or in substitution for, such injunction and the court may, if it thinks fit, award such damages.*

(2) No relief for damages shall be granted under this section unless the plaintiff has claimed such relief in his plaint :

Provided that where no such damages have been claimed in the plaint, the court shall, at any stage of the proceedings, allow the plaintiff to amend the plaint on such terms as may be just for including such claim.

(3) The dismissal of a suit to prevent the

breach of an obligation existing in favour of the plaintiff shall bar his right to sue for damages for such breach."

Mr.Sarin contends that sub-section (1) mandates that in a suit for permanent injunction, damages can be claimed in substitution to or in addition to the relief of injunction. However as per sub-section (2) the relief of damages can only be granted if the same had been specifically claimed in the plaint. A proviso of sub-section (2) clarifies that the Court shall allow the plaintiff to amend the plaint to include the relief of damages at any stage of the proceedings on such terms as may be considered justified for including the claim. Learned counsel further submits that a reading of sub-section (3) would show that if the claim of damages is not made in the suit of injunction, the plaintiff shall be debarred from thereafter suing for damages for such a breach. He therefore submits that it would flow from a reading of Section 40 that a plaintiff is entitled to seek an amendment in the plaint in a suit for permanent injunction to include a claim of damages and therefore the order of the trial court declining the application in the present case cannot be sustained and is liable to be set aside. In support of his contention Mr.Sarin has relied upon a judgment of Hon'ble Supreme Court in ***Ragu Thilak D. John v. Rayappan and others, AIR 2001 Supreme Court 699***.

On the other hand learned counsel for the respondents contends that if the application is allowed it would amount to completely changing the nature of the suit. Such an amendment cannot be permitted. In addition thereto learned counsel has raised an objection that in fact the relief of damages is by now barred by limitation. He has also referred to certain other litigations instituted by the petitioner to contend that in fact the stage for claiming the relief for damages had by now passed and at this stage therefore the present application cannot be allowed.

After hearing learned counsel for the parties I find merit in the

contentions raised by the learned counsel for the petitioner. A bare reading of Section 40 of the Specific Relief Act, 1963 makes it clear that in the circumstances as exist in the present case, the courts should allow an application for amendment to include relief of damages. It could not be denied by either of the parties before me that today relief of permanent injunction as had been originally claimed when the suit was instituted cannot be granted to the plaintiff. This is for the reason that the goods have by now already been sold. Under these circumstances I am of the opinion that the petitioner is entitled to seek amendment of the plaint to include the relief of damages in view of the fact that the original relief of permanent injunction claimed by him is today incapable of being granted to the plaintiff. If the plaintiff can show that he has suffered on account of any deficiency or breach on the part of the defendants he would be entitled to claim damages for the same.

In so far as the objections raised by the learned counsel for the respondents are concerned including the objection of limitation I am of the opinion that the same relate to the merits of the claim. The respondents would be entitled to raise all objections including the objection of limitation before the trial court. The same would be considered by the trial court in accordance with law. It is for this reason that I do not find it appropriate to go into the same at this stage.

In view of the above the order passed by the trial court dated 7.5.2004 is set aside. The application filed by the petitioner seeking to amend the plaint shall stand allowed.

The revision petition is therefore allowed in the aforesaid terms.

December 01, 2006 (P.S.Patwalia)
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